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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. JACOB SCOTT LAKE, Defendant and Appellant.	C077560 (Super. Ct. No. 13F6575)

A second amended information charged defendant Jacob Scott Lake with 16 felony offenses alleging sexual assault against three teenage girls. A jury found defendant guilty on all counts. The trial court sentenced defendant to 18 years eight months plus 160 years to life with no possibility of parole or, in the alternative, 18 years eight months plus 185 years to life with the possibility of parole. Defendant appeals, contending the court erred in allowing evidence of uncharged sexual offenses,

instructional error, and sentencing error. We shall direct a sentencing correction, but otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant sexually assaulted three teenage girls he had befriended. A second amended information charged defendant with 16 felony offenses as follows:

Counts 1 through 5 apply to victim T.Z., 15 years old: count 1, forcible rape (Pen. Code, § 261, subd. (a)(2));[1] count 2, unlawful sexual intercourse with a minor more than three years younger than defendant (§ 261.5, subd. (c)); count 3, forcible oral copulation of a minor under 18 (§ 288a, subd. (c)(2)(C)); count 4, oral copulation of a person under 18 (§ 288a, subd. (b)(1)); and count 5, sexual penetration of a minor 14 years of age or older (§ 289, subd. (a)(1)(C)).

Counts 6 through 11 apply to victim H.R., also 15 years old: count 6, sexual battery (§ 243.4, subd. (d)); count 7, forcible oral copulation of a minor under 18 (§ 288a, subd. (c)(2)(C)); count 8, forcible rape (§ 261, subd. (a)(2)); count 9, unlawful sexual intercourse with a minor more than three years younger than defendant (§ 261.5, subd. (c)); count 10, forcible rape (§ 261, subd. (a)(2)); and count 11, unlawful sexual intercourse with a minor more than three years younger than defendant (§ 261.5, subd. (c)).

Counts 12 through 16 apply to victim V.H., 18 years old: count 12, sexual battery (§ 243.4, subd. (d)); count 13, forcible oral copulation (§ 288a, subd. (c)(2)(A)); count 14, forcible rape (§ 261, subd. (a)(2)); count 15, forcible rape (§ 261, subd. (a)(2)); and count 16, forcible oral copulation (§ 288a, subd. (c)(2)(A)).

The second amended information further alleged, within the meaning of section 667.61, subdivision (e)(4), that as to counts 1, 3, 7, 8, 10, 13, 14, 15, and 16, defendant

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[1] All further statutory references are to the Penal Code unless otherwise designated.

committed aggravated sex crimes, section 288a, subdivision (c)(2)(A) or section 261, subdivision (a)(2), against more than one victim. As to counts 8 and 10, it was alleged that defendant personally inflicted great bodily injury on the victim. (§§ 667.61, subds. (a) & (d), 12022.53, 12022.7, or 12033.8.) As to counts 8 and 10, it was alleged that in the commission of the offenses, defendant inflicted great bodily injury on H.R. within the meaning of section 12022.8. As to counts 6 through 16, it was alleged defendant committed the offenses while on bail. (§ 12022.1.)

A jury trial followed. The following evidence was introduced regarding the charges against each victim.

T.Z.

The Incident

One evening in November 2012 T.Z. attended a youth group meeting at a church. T.Z. saw defendant, then aged 19, in the parking lot. T.Z. met defendant a year earlier at another church event.

Later that evening, defendant approached T.Z. and told her he wanted to talk to her outside. He seemed angry and told T.Z. she could go willingly or he would carry her. T.Z. acquiesced and the two walked outside. Defendant told T.Z. she was not giving him the same thing she gave other boys.

As they reached the parking lot, defendant began kissing T.Z. He asked if he could handcuff her, and T.Z. believed she had no choice but to comply. Defendant handcuffed T.Z.'s wrists behind her back. He said he could do anything he wanted to her because she was handcuffed.

Defendant began groping T.Z. all over her body. She begged him to stop and tried to get away. Defendant pulled up T.Z.'s shirt to touch her skin. She asked defendant to "please stop" and was afraid of him. Defendant pushed T.Z. to the ground, continued to grope her, pushed her clothing down, and inserted his finger into her vagina. He put his penis into her mouth.

T.Z. asked defendant to remove the handcuffs, and he made her promise not to leave if he did so. He then laid T.Z. back down and penetrated her with his penis. T.Z. was in pain; she later discovered her rib was broken. She got up, put her clothes back to where they belonged, and walked back to the building. Defendant made her promise not to tell anyone about what happened.

The Aftermath

T.Z. told her grandmother about what had happened, and two days later she was taken to the hospital for a sexual assault examination. A vaginal swab indicated the presence of sperm. DNA testing revealed the sperm on the swab matched defendant's DNA profile.

A phone interview conducted by a police officer with defendant was played for the jury. Initially, defendant denied knowing anything about the incident. Subsequently, defendant admitted he was at the church and had planned to "hang out" with T.Z., but she changed her mind. T.Z. joined him outside and they talked about defendant's ex-girlfriend. T.Z. was jealous of defendant and his ex-girlfriend.

Defendant admitted knowing T.Z. was a minor but denied that anything other than kissing took place. When confronted with the results of the sexual assault examination, defendant stated he had masturbated and touched T.Z. with the hand that had the semen on it. He also stated T.Z. might have put her finger into her vagina while she was in the bathroom because she was jealous of his ex-girlfriend.

H.R.

The Incidents

In September 2013 an officer contacted 15-year-old H.R. and her mother regarding a report of a sexual assault involving defendant, then aged 19. H.R. described three separate incidents involving defendant. Defendant was H.R.'s boyfriend's best friend and she also considered defendant a friend.

In the first incident, in August 2013, H.R. was at her boyfriend's house with defendant and defendant's girlfriend. She went into her boyfriend's room with her boyfriend and defendant because they wanted to talk to her. Defendant asked her boyfriend to leave so he could talk to H.R. Defendant suddenly grabbed a pocketknife and sat next to H.R. on the bed. He began to rub the knife on her arms, chest, and stomach. H.R. asked him to stop. Defendant tossed the knife and it landed next to the bed. He then grabbed her neck and made her kiss him; she was afraid of what he would do next.

H.R.'s boyfriend walked into the room but left when defendant asked for more time with H.R.

Although H.R. tried to get her boyfriend to stay, he left them alone in the room. Defendant began touching H.R.'s breasts and she asked him to stop. He put his hand around H.R.'s throat and threatened to choke her if she did not stay quiet. Defendant left bruises on H.R.'s throat. Still holding her by the throat, defendant lifted her shirt and began touching her breasts. He put his mouth on her breasts.

H.R.'s boyfriend walked back into the room and then angrily left the house. Defendant told H.R. to tell her boyfriend she was the one who cheated. Defendant followed H.R.'s boyfriend out of the house and H.R. stayed in the living room with defendant's girlfriend. H.R. told her what had happened. When her boyfriend returned, H.R. told him what had occurred, but he did not believe her. H.R. did not contact the police because she was afraid of defendant. She continued to hang out with defendant because he was always with her boyfriend.

In the second incident, three days later, H.R. was at defendant's house with defendant and her boyfriend. Defendant again asked to be alone with H.R. Defendant and H.R. went into defendant's room to measure her for a top they were going to use in a home movie. H.R. did not think defendant would do anything to her again.

Defendant told H.R. to take off her shirt and then told her to undress completely. When she refused, defendant undressed her and pushed her down on the bed. Defendant began to orally copulate her and demanded she put her hand on his head. Afraid, H.R. complied. Defendant gave her the choice of performing oral sex on him or he would continue performing oral sex on her. He continued to orally copulate H.R. Defendant then raped her by putting his penis into her vagina. H.R. tried to push him off and begged him to stop. He did not wear a condom. After he was done, defendant told her to get dressed.

H.R. continued to hang out with defendant because of his relationship with her boyfriend. Less than a week later, H.R. and defendant walked through a field on their way to a school. Defendant pushed her into a clearing, took off her sweater, and tried to take off her shirt. H.R. begged him to stop, but he told her to be quiet. When she refused to take off her shorts and underwear, defendant pulled them off. Defendant raped her by putting his penis into her vagina.

The Aftermath

A few weeks later, H.R. found out she was pregnant. An officer asked her to participate in a pretext telephone call with defendant, which was played for the jury. During the call, H.R. told defendant she had missed her period. Defendant said he could not have gotten her pregnant because he was sterile due to drinking Mountain Dew. He also denied ejaculating inside her and insisted he had ejaculated on the ground. Defendant asked H.R. if the police had contacted her and told her not to tell anyone that he raped her. He told H.R. everyone thinks she is a "slut," and no one would be on her side except for her mother.

Defendant also said he technically did not rape her because she "showed enjoyment in it." He acknowledged H.R. was 15 years old and threatened to tell her mother she was having sex with her boyfriend and had been drinking alcohol. H.R. asked why he had done this to her, and he said she subconsciously wanted it and enjoyed it.

H.R. said she had asked him to stop, but he said she had enjoyed it and that he was "teaching her." When H.R. asked if he was sorry, defendant asked her to define "sorry."

H.R. went into labor eight weeks early and was hospitalized. She gave birth through caesarean section and had to have stitches. DNA testing provided a strong indication that defendant was the father.

V.H.

The Incidents

V.H. was best friends with defendant's girlfriend and considered defendant a friend. In September 2013 V.H., aged 18, was dating a boy. One night her plans to stay with that boy fell through, so V.H. stayed overnight at defendant's house. V.H. and defendant watched movies. After defendant's father went to bed, V.H. went into the guest room to sleep.

A short time later, defendant entered the guest room and asked V.H. if she wanted to have some fun. When V.H. declined, defendant lifted her shirt and began groping her breasts. Defendant told her he just wanted to have a little fun and began kissing her. V.H. pushed him away and he left when he heard his father going to the bathroom.

When V.H. later went into the kitchen to get something to drink, defendant appeared. He picked her up, put her on the counter, and began kissing her. She tried to push him away, but he continued to kiss her, picked her up, and carried her to the couch. V.H. felt frightened and betrayed. Defendant straddled her, pulled up her shirt, and pinned her hands above her head. He licked V.H.'s breasts and rubbed his penis on her vagina.

Defendant put his hand around V.H.'s neck and told her he knew how to crush a windpipe. She was afraid defendant would hurt her. He kept his hand on her throat for about 10 minutes and continued to rub himself on her for 20 to 30 minutes. V.H. said she thought she heard defendant's dad or dog, and defendant stopped. V.H. dressed and went back to the guest room, crying.

V.H. did not tell the boy she was dating what happened because he and defendant were like brothers. She was also afraid he would not believe her. Later, defendant called V.H., apologized, and said it would never happen again.

A few weeks later, V.H., defendant's girlfriend, another girl, and defendant went camping about 20 minutes from defendant's girlfriend's house. V.H. and defendant went ahead to set up the tents, to be joined by the others later. When V.H. told defendant she was going to change clothes in the tent, defendant told her he could warm her up. V.H. said no.

Defendant pulled her into the tent and took off both their shirts. He sat behind her with his legs on either side and said, "I am like a human heater." Defendant wrapped his arms around her to prevent her from getting away. He put a blanket on the ground and made V.H. lie down, pushing her back down when she attempted to get up.

V.H. told defendant she would tell his girlfriend, but he said his girlfriend would not believe her. No one would believe her and she would lose her boyfriend and all her friends because he knew how to convince people. Defendant again took off V.H.'s shirt and she slapped him. He took off her bra and licked and sucked her breasts. He straddled her stomach, took off her shorts, and kissed her inner thighs. Defendant took off her underwear as she cried and begged him to stop. Defendant put his finger inside her vagina and then orally copulated her. When V.H. tried to push him away, he pinned her arms above her head. V.H. reminded defendant he was dating someone, but defendant said his girlfriend would not have sex with him and she would never find out. Defendant told V.H. he was a sex addict and usually got what he wanted.

V.H. received a text message from defendant's girlfriend asking defendant and V.H. to return to the house. Although defendant said he would stop when V.H. responded to the text message, he continued to orally copulate her for 10 to 20 minutes more. He then masturbated and ejaculated on the tent floor. Defendant told V.H. he felt bad and did not want her to tell his girlfriend because it would ruin his relationship.

When they met defendant's girlfriend and the other girl, V.H. did not tell defendant's girlfriend what had happened. Nor did she call the police because she feared defendant would hurt her. At the campsite, V.H. and the other girl slept in one tent; defendant and his girlfriend slept in the other. The next morning, V.H. thought defendant had left with the two other girls, so she went back to sleep. Defendant entered her tent and carried her to the other tent.

Defendant ignored V.H.'s pleas to put her down. Defendant rolled her on her back and took off her shirt. V.H. tried and failed to push him away and defendant straddled her. After she tried to slap him, defendant pinned her hands above her head. Defendant took off her bra and began kissing her, again ignoring her protestations to stop.

Defendant removed her shorts and underwear, orally copulated her, and raped her by putting his penis into her vagina. When V.H. cried and begged him to stop, defendant asked why she was pushing him away because he knew she wanted it. With his hand tightly around V.H.'s throat, defendant continued to rape her for about 30 to 45 minutes. V.H. continued to struggle and defendant told her he knew how to crush her windpipe. He also said he would tighten his grip on her throat if she cried out. After defendant ejaculated inside her, he acted proud of himself and smirked at her. Defendant later sent V.H. a text message saying he was sorry, but he knew she would not tell anyone.

Defendant's Statements

Defendant showed a classmate from junior college his ankle monitor and told the classmate he had been arrested for raping a 15-year-old girl at a church. Defendant acted smug about the incident and did not deny it had occurred.

In October 2013 an officer interviewed defendant at the police station. The jury heard the interview during trial. Defendant admitted he knew V.H. and admitted kissing her and rubbing her breasts. He also said that during the camping trip, as they were setting up the tents, he kissed and caressed V.H. The next morning he had sex with V.H. and performed oral sex on her. Defendant stated he stopped when she started crying.

He also told the officer H.R. was like a sister to him and he knew she was a minor. Defendant denied touching her vagina and said he could not have gotten her pregnant because they never had sex. After being confronted with the pretext telephone call, defendant admitted having sex with H.R. twice and twice putting his mouth on her vagina.

Uncharged Offenses

The court also allowed evidence of uncharged offenses against two victims: A.L. and K.R.

A.L.

A.L. is defendant's sister. In 2008, when A.L. was 17 years old and defendant was 14 years old, they were playing "Marco Polo" in the family pool. A.L. tried to grab defendant's leg but accidentally pulled down his shorts instead. She tried to apologize, but defendant was humiliated and left. Defendant later returned to the pool and they began playing again.

Afterwards, A.L. took a shower and went into her bedroom. Defendant entered the bedroom, pointed a knife at her, and told her he wanted to see her naked. Defendant had an erection and she was afraid defendant would stab or rape her. She asked him to give her the telephone because she needed to make a call. She went into her bedroom, locked the door, and called her father. Her father told her to call the police.

K.R.

K.R. and defendant were friends. In October 2011, when K.R. was 17, defendant asked her to go for a walk. They had walked to a nearby wooded area when her mother sent a text message telling her to come home.

Defendant refused to take her back unless she had sex with him. K.R. refused, but defendant insisted. He pulled his pants down and held his penis. Defendant tried to pull down K.R.'s sweatpants, but she told him no and to stop. K.R.'s mother kept calling. As

K.R. tried to walk away, defendant grabbed her chest. She found her way back home and called the police.

Defense Case

Defendant testified in his own defense. He admitted having sexual intercourse with T.Z., V.H., and H.R. but claimed all the acts were consensual. According to defendant, he is unable to be physically aggressive toward women. His fear of women stems from his sister forcing him to have sex with her when he was five years old. When he becomes angry, he is unable to move and his body paralyzes itself.

Defendant believed T.Z. was 17 years old; he had no idea she was 14 or 15. He and T.Z. sent one another joking text messages about having sex in the church, and T.Z. did not deny wanting to engage in sexual activity. Defendant denied handcuffing her and believed she was a willing participant in the sexual activity. She did not object and never told defendant to stop while they were having sex.

V.H. welcomed his sexual advances when she spent the night at his house. She never objected or asked him to stop when he fondled her. Defendant denied putting his hand on her throat or threatening to choke her. During the camping trip, V.H. did not object when he licked her vagina and inserted his finger into her vagina. When V.H. asked him to stop he did. She did not ask him to stop the next morning when he fondled her and licked her vagina. Although V.H. cried while they had sex, she did not ask defendant to stop. He only stopped when he discovered she lied to him and was still dating someone.

When H.R. and defendant were alone in her boyfriend's room, she did not ask him to stop when he ran the back side of a pocketknife blade outside her clothing. He denied grabbing her throat or threatening to choke her. Although H.R. seemed surprised when he kissed her, she did not ask him to stop. Defendant told H.R. that her boyfriend had asked him to find out what turned her on. When H.R.'s boyfriend entered the room, defendant told him what he had learned and asked him to stay. H.R.'s boyfriend said he

would be back in 10 minutes. H.R. took off her underwear and did not object when defendant licked her vagina.

Defendant denied using force on H.R. when they were in the field. She did not push him away while he fondled her, rubbed her vagina, and rubbed his penis against her. He was unable to insert his penis into her vagina. H.R. seemed normal when they walked back to her apartment.

Verdict and Sentencing

The jury found defendant guilty of all 16 counts and found true the special allegations of aggravated sex crimes against more than one victim as to counts 1, 3, 7, 8, 10, 13, 14, 15, and 16. The jury further found true the special allegations that defendant inflicted great bodily injury.

The court sentenced defendant under two schemes. Defendant was sentenced to the aggregate term of 18 years eight months in state prison, plus 160 years to life without the possibility of parole. In the alternative, the court sentenced defendant to the aggregate term of 18 years eight months in state prison plus 185 years to life.

The court ordered the upper term of three years for count 6 and designated it as the principal term. As to count 5, the court ordered defendant be sentenced to the determinate aggravated term of 10 years, to run consecutively to count 6. As to counts 2, 4, 9, and 11, the court ordered defendant to serve eight months, one-third of the midterm, on each count and stayed each of those sentences under section 654. As to count 12, the court sentenced defendant to eight months, to run consecutively to count 6. On counts 1, 3, 7, and 10, the court sentenced defendant to consecutive 25-year-to-life sentences under section 667.61, subdivision (m). For counts 13, 14, 15, and 16, the court sentenced defendant to serve consecutive 15-year-to-life sentences pursuant to section 667.61, subdivision (b). On count 8, the court sentenced defendant to life without the possibility of parole under section 667.61, subdivision (*l*), plus a five-year enhancement for the great bodily injury special allegation under section 12022.8, to run consecutively to count 6. In

the alternative, on count 8, the court sentenced defendant to 25 years to life pursuant to section 667.61, subdivision (a), plus a five-year enhancement to run consecutively to count 6.

Defendant filed a timely notice of appeal.

DISCUSSION

I

Evidence of Uncharged Offenses

At the outset, defendant argues the trial court erred in admitting evidence of uncharged sexual offenses involving his sister under either Evidence Code section 1101 or 1108. Defendant contends the evidence of the uncharged offense involving his sister should have been excluded because it was remote in time, unduly prejudicial, and not similar to the charged offenses.

Background

The prosecution sought to introduce evidence of uncharged crimes against A.L. and K.R. The prosecution argued defendant's conduct in those incidents was very similar to the current, charged acts and the probative value was not outweighed by unfair prejudice or possible jury confusion.

In response, the defense argued the evidence would cause substantial prejudice to defendant, involve an undue consumption of time, and create juror confusion. The prosecution disagreed, stating: "And I think that [Evidence Code section] 1108 evidence and the jury instruction provided don't confuse the jury of the issues. They are very specific instances. One or two witnesses, at most, for the 2008 incident, and one witness, potentially two if a police officer had to testify about the 2011 incident. And they are easily distinguished in time and as unrelated to the victims in this case. So, I don't believe that there would be any undue consumption of time, nor is there a risk of confusing the jury, especially with how extensive the 1108 instruction is that the Court reads to the jury if the evidence is presented."

The court reiterated the basis for admitting evidence under Evidence Code section 1108 and stated: "In relying on the moving papers, it seems to me that while there's no question that these acts are material in demonstrating a propensity to commit sex crimes, sexual crimes, the acts themselves are relevant, it seems to me, in proving those charges. They are not particularly inflammatory when considered against the other charges in the case. One has to do with an incident in a swimming pool and some conduct that follows, the apparent effort of the victim to pull down the shorts of the defendant, and then some things that follow after that, but they are not particularly inflammatory in comparison to the other things that are alleged against him.

"The other is about the walk on the trail and not willing to take someone home unless he is given sex, and certainly not positive when it comes to your client, but it's not inflammatory in the sense that there was some sort of tying or binding or torture or weapons used, that sort of thing, at least in that second incident. There was an allegation in the first, I think, about a knife that was displayed, which is a factor that I have in mind, but I don't think disqualifies it in light of some of the other things that were done to the victims in the underlying case having to do with handcuffing and whatnot. So, in comparison, I don't think these are particularly inflammatory as we understand those things."

The court also found the prior incidents did not have the potential to confuse the jury. As for the remoteness of the crimes, the court noted they were committed in 2012 and 2013, "[s]o these are almost serial events of misconduct over that short span of five years, which . . . in that sequence, would not be remote in the way you would expect a witness to be excluded. There is not an event twenty years ago and a separation from the current offense of twenty years of crime-free, law-abiding life. So they are prejudicial. There's no question about it. That's the whole point of admitting them, but they are not substantially more prejudicial than they are probative. They are highly probative, it seems to me, and whatever prejudice may inure to your client is the sort intended under

the section. It's not unfair prejudice. It's not evidence, let's say, of him being a gang member, causing . . . to defend something that has absolutely no relation to the underlying charges, or that he is a prior felon, bringing that up for no particular reason. It's just the sort of prejudice that would naturally spring from prior sex offenses."

Turning to Evidence Code section 1101, subdivision (b), the court determined that the admission of the prior crimes evidence would not involve an undue consumption of time: "I suspect this could come and go in half a day, total. It's at least conceivable in my mind it could go that quickly. As I understand it, there's not going to be a lot of scientific evidence. There are not going to be a number of witnesses." Under Evidence Code section 352 the prior crimes were probative on the issue of the common plan or scheme: "I think the similarities, although they are not identical, they certainly do illustrate that when the defendant is alone with females, he has a plan of somehow asserting dominance over them to achieve a sexual purpose, whether it's in a swimming pool, whether it's along a trail, whether it's at a church group function, he singles out young females, isolates them or finds them isolated in the circumstance, he exerts either direct physical control over them or . . . threatens implicitly or directly that he is going to insist on them providing him with sexual favors. They are within a range, as I understand it, among the same age category. . . .

"It's not as though this is just something that happens innocently when he happens to get drunk . . . he wants to be aggressive with women. This seems to be much more thought out, seems to be much more part of his overall repertoire, let's say, in that he finds females that he senses may be in the position of being vulnerable or available to him, and the plan at that point is to assert himself sexually and dominantly." The court concluded the evidence was admissible under Evidence Code sections 1108 and 1101, subdivision (b).

Discussion

In general, evidence of a defendant's uncharged conduct is not admissible to prove that the defendant has a criminal disposition or propensity. (Evid. Code, § 1101, subd. (a); *People v. Kipp* (1998) 18 Cal.4th 349, 369.) But Evidence Code section 1108 provides that when a defendant is charged with a sexual offense, evidence of the defendant's other sexual offenses is not made inadmissible by Evidence Code section 1101 if the evidence is not inadmissible under Evidence Code section 352.

The Legislature, in enacting Evidence Code section 1108, recognized that " 'sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations.' " (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1160, 1164; *People v. Falsetta* (1999) 21 Cal.4th 903, 911 (*Falsetta*).) Evidence Code section 1108 allows the trier of fact to consider uncharged sexual offense evidence as evidence of the defendant's propensity to commit sexual offenses in evaluating the defendant's and the victim's credibility and in deciding whether the defendant committed the charged sexual offense. (*Villatoro, supra*, at pp. 1160, 1164, 1166-1167; *Falsetta, supra*, at pp. 911-912, 922.)

However, uncharged sexual conduct evidence is inadmissible if the probative value of the evidence is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, §§ 352, 1108, subd. (a).)

The California Supreme Court has provided guidance on the admissibility of prior sexual offenses: "Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its

likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*Falsetta, supra,* 21 Cal.4th at p. 917.)

We review a trial court's Evidence Code section 352 determination under the deferential abuse of discretion standard. (*People v. Avila* (2014) 59 Cal.4th 496, 515.) We will not reverse unless the trial court exercised its discretion in an arbitrary, capricious, or absurd manner resulting in a miscarriage of justice. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1004.)

Defendant argues the trial court failed to recognize the evidence of the incident involving his sister was unduly prejudicial, not similar to the charged offenses, and was remote in time. He also contends it is significant that he was a juvenile at the time: "It was unreasonable for the trial court to permit evidence of an act committed when [defendant] was a child to be used as an indicator of predispositions he might have as an adult." In support, defendant cites *Miller v. Alabama* (2012) 567 U.S. 460 [183 L.Ed.2d 407].

We disagree. The trial court found the uncharged acts against A.L. were relevant to show defendant had a propensity to commit the sexual offenses. The court, as required under Evidence Code section 1108, considered the materiality of the facts sought, the tendency of the uncharged crimes to prove those facts, and the existence of any rule or policy requiring exclusion. The court then balanced the probative value against the inflammatory nature of the uncharged conduct, possibility of confusion of the issues, remoteness of the uncharged offenses, and undue consumption of time and found the evidence admissible under Evidence Code section 1108.

We agree with the trial court's assessment of the uncharged acts against A.L. The evidence was material in demonstrating defendant's propensity to commit the charged

crimes and was not particularly inflammatory or confusing, nor would it take up an undue amount of time at trial. However, defendant stresses he was 14 years old at the time of the uncharged offense and therefore the court abused its discretion. We find no such abuse of discretion. *Miller* discussed age in the context of sentencing and the constitutional prohibition against cruel and unusual punishment. *Miller* did not expand its discussion to the admissibility of evidence. *Miller* is inapplicable in the present case.

The trial court also admitted the evidence of uncharged offenses under Evidence Code section 1101, subdivision (b). Defendant contends the court erred in finding the incident involving A.L. similar to the charged offenses.

In committing both the charged offenses and the uncharged offenses, defendant isolated his victims and asserted dominance over them to commit sexual crimes. He targeted teenage girls who were isolated or whom he could isolate, threatened them, exerted physical control, and then committed sexual acts. His victims were close in age. Defendant challenges this analysis, arguing that when A.L. was assaulted she was in her own home and the prosecution did not establish no one else was home. We find this a distinction without a difference. Defendant targeted vulnerable teenage girls, threatened them, and demanded sexual favors. The court did not abuse its discretion in finding the evidence admissible under Evidence Code section 1101, subdivision (b).

II

Instructional Error

Defendant, in a related claim, argues the trial court violated his due process rights in instructing pursuant to CALCRIM No. 1191. We find defendant's due process claim lacks merit.

The court instructed pursuant to CALCRIM No. 1191: "If you decide that the defendant committed the uncharged offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit and did

commit the offenses charged in this case. If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of the offenses charged in this case. The People must still prove each charge and allegation beyond a reasonable doubt."

The California Supreme Court rejected an identical due process argument in *People v. Reliford* (2003) 29 Cal.4th 1007. The court in *Reliford* concluded the language of former CALJIC No. 2.50.01, the predecessor to CALCRIM No. 1191, was not likely to mislead the jury concerning its consideration of uncharged crimes evidence in determining whether the prosecution met its burden of proving the elements of the charged crimes beyond a reasonable doubt. (*Reliford*, at pp. 1012-1016.) Subsequent appellate decisions reaffirmed *Reliford*'s conclusion. (*People v. Cromp* (2007) 153 Cal.App.4th 476, 479-480; *People v. Schnable* (2007) 150 Cal.App.4th 83, 87.)

III

Sentencing Error

Life Without Possibility of Parole

Defendant contends his sentence of life without possibility of parole must be set aside because the prosecution failed to adequately plead the provisions of section 667.61, subdivision (*l*) in a manner to give defendant notice he would be subject to such a sentence if convicted of count 8. According to defendant, the prosecution did not comply with the special pleading section and the constitutional due process notice requirement.

Background

The prosecution filed a sentencing memorandum requesting that the court sentence defendant to 160 years to life in state prison without the possibility of parole and, in the alternative, 185 years to life with the possibility of parole. The prosecution explained that under section 667.61, subdivision (*l*), defendant should be sentenced to an

indeterminate prison term of life without the possibility of parole; however, the People did not plead this section in the information.

The prosecution argued that under section 667.61, subdivision (o), the People only needed to allege the circumstances of subdivisions (d) and (e) of section 667.61 and not the specific subdivision that provides for the punishment. In addition, the prosecution stated defendant should be sentenced to 185 years to life with the possibility of parole because the indeterminate term for count 8 would become 25 years to life instead of life without the possibility of parole.

At the sentencing hearing, the prosecutor explained that, as to count 8, she understood "that this case will be appealed . . . and in this particular case because there is no case law on it, I would rather the court play it safe and sentence under two schemes, so if an appellate court says, no, there has to be a notice requirement under the life without the possibility of parole subsection, we're aware of that in the future, and [defendant] doesn't have to come back for re-sentencing because he has been sentenced alternatively on Count 8." According to the prosecutor, "I believe the only count he has to be alternatively sentenced on would be Count 8. The code makes it very clear that the actual subsection does not have to be pled and proven as long as the factors are pled and proven. Here, the factors were pled and proven as well as the victim's age as to Count 8."

The court responded: "I only found a case in which it referred to the actual language of the qualifying subdivision being referred to in the pleading. I guess the controversy, among others on the appeal as to this issue, will relate more to whether or not in your first [gross bodily injury] enhancement you somehow misdirected the accused in giving notice, because the enhancement that you alleged in 667.61(a)(d)(6) specifies 25 years to life, basically. And the argument may develop on appeal that you in some way, as I say, misdirected or forfeited your right to ask for the [life without possibility of parole].

"I'm choosing not to regard that as a forfeiture on your part, or your office's part, in the charging because I agree more broadly with you that the facts of the underlying incident, the rape and the infliction of great bodily injury and the second subdivision, 12022.8, of [gross bodily injury], more or less puts all the possibilities on the table. But I do agree, as a precaution, it probably would be prudent to sentence in the alternative as to Count 8."

Following oral argument, the court sentenced defendant on count 8: "On Count 8, although I do admit to the controversy, it is my view that by pleading the facts and circumstances underlying the allegation that you were on notice that this was a potential life in prison without possibility of parole case. And so as to Count 8, it is the judgment and sentence of this court that you be sentenced to serve a term of life in prison without the possibility of parole pursuant to Penal Code section 667.61."

In addition, the court, as an alternative to the sentence in count 8, sentenced defendant to 25 years to life with the possibility of parole. The court stated: "I do that only because of the uncertainty as to the sufficiency of the pleading as to that special enhancement."

Discussion

Section 667.61, the so-called "One Strike" law, provides for an alternative, more severe sentencing scheme in the case of certain forcible sex crimes. The penalties apply "only if the existence of any circumstance specified in subdivision (d) or (e) is alleged in the accusatory pleading pursuant to this section, and is either admitted by the defendant in open court or found to be true by the trier of fact." (§ 667.61, subd. (o).) Section 667.61, subdivision (*l*) states that "Any person who is convicted of an offense specified in subdivision (n) under one or more of the circumstances specified in subdivision (d) or under two or more of the circumstances specified in subdivision (e), upon a victim who is a minor 14 years of age or older shall be punished by imprisonment in the state prison for life without possibility of parole. If the person who was convicted was under 18 years of

age at the time of the offense, he or she shall be punished by imprisonment in the state prison for 25 years to life."

The specific numerical subdivision of a qualifying One Strike circumstance under section 667.61 need not be pleaded to satisfy the statutory pleading requirements as long as an information afforded a One Strike defendant fair notice of the qualifying statutory circumstances or circumstances that are being pleaded, proved, and invoked in support of the One Strike sentencing. (*People v. Mancebo* (2002) 27 Cal.4th 735, 753-754 (*Mancebo*).)

In the present case, the circumstances under both subdivisions (d) and (e) of section 667.61 were alleged in two separate enhancements. The jury found true the multiple victim enhancement under section 667.61, subdivision (e)(4) and the great bodily injury enhancement under section 667.61, subdivision (d)(6). The trial court found that under section 667.61, subdivision (o), the People need only allege the circumstances of subdivisions (d) and (e) and give defendant notice that the prosecution was seeking a prison term of life without possibility of parole.

In addition, the second amended information alleged that defendant committed the offense of raping H.R. and that she was 15 years old at the time. Therefore, the information pleaded the facts necessary to the application of section 667.61 even though it did not refer to that subdivision.

Defendant also argues that even if the People established the elements necessary to support a sentence of life without possibility of parole, the sentence must be set aside because the prosecution failed to give defendant notice in violation of his due process rights. In support, defendant relies on *Mancebo, supra*, 27 Cal.4th 735.

Due process requires that a defendant be advised of the specific charges in order to adequately prepare a defense and not be taken by surprise by the evidence offered at trial. In addition, a defendant has a due process right to fair notice of the specific sentence

enhancement allegations that will be invoked to increase punishment for his or her crimes. (*Mancebo, supra*, 27 Cal.4th at pp. 747, 750.)

In *Mancebo*, the defendant was charged and convicted of sex crimes against two victims. To obtain a 25-year-to-life sentence as to each victim, the prosecution alleged two circumstances specified in section 667.61, subdivision (e). For one victim, the prosecution alleged the defendant personally used a firearm under section 12022.5 and that he kidnapped the victim. For the other victim, the prosecution alleged defendant personally used a firearm under section 12022.5 and that he tied or bound the victim. As a separate enhancement to each crime, the prosecution alleged personal use of a firearm under section 12022.5. (*Mancebo, supra*, 27 Cal.4th at pp. 738, 742.)

The jury found all allegations true. At sentencing, the court imposed a 25-year-to-life sentence by substituting an unpleaded multiple-victim circumstance, section 667.61, subdivision (e)(5), for the expressly pleaded gun-use circumstance in order to satisfy the minimum number of circumstances required for One Strike sentencing under section 667.61, subdivision (f). As a result, the gun-use finding became available as a basis for a gun-use enhancement under section 12022.5. (*Mancebo, supra*, 27 Cal.4th at p. 740.)

The Supreme Court considered whether a gun-use enhancement could support two section 12022.5, subdivision (a) enhancements when the fact had been properly pleaded as a basis for the One Strike life sentence but the multiple-victim circumstance had been neither pleaded nor found true. (*Mancebo, supra*, 27 Cal.4th at p. 738.) The court concluded that, under subdivision (f) and former subdivision (i) of section 667.61, the circumstances qualifying a defendant for sentencing under the One Strike law must be alleged in the accusatory pleading and found true by the trier of fact. (*Mancebo*, at pp. 743-745.) According to the court: "[N]o factual allegation in the information or pleading in the statutory language informed defendant that if he was convicted of the underlying charged offenses, the court would consider his multiple convictions as a basis for One Strike sentencing . . . . Thus, the pleading was inadequate because it failed to put

defendant on notice that the People, for the first time at sentencing, would seek to use the multiple victim circumstance to secure indeterminate One Strike terms under section 667.61, subdivision (a) *and* use the circumstance of gun use to secure additional enhancements under section 12022.5." (*Mancebo*, at p. 745.)

In contrast, in the present case, the second amended information pleaded the multiple victim enhancement pursuant to section 667.61, subdivision (e)(4) and the great bodily injury enhancement pursuant to section 667.61, subdivision (d)(6). Unlike the facts underlying *Mancebo*, here the accusatory pleading put defendant on notice of the basis of his eligibility for a One Strike sentence, and the jury found the alleged circumstance true. "The purpose of the due process notice requirement is to afford an accused ' " 'a reasonable opportunity to prepare and present his defense and not to be taken by surprise by evidence offered at his trial.' " ' " (*People v. Neal* (1984) 159 Cal.App.3d 69, 72.) This purpose has been met here.

Failure to Instruct on Elements Required Under Section 667.1, Subdivision (*l*)

In a related argument, defendant contends his sentence of life without possibility of parole on count 8 must be set aside due to instructional error. Specifically, defendant argues the trial court failed to instruct on the elements required to prove the applicability of section 667.61, subdivision (*l*) in violation of his right to a jury trial.

Defendant argues the trial court should have instructed, sua sponte, as follows: "If you find the defendant guilty of the offense charged in count 8, you must then decide whether the People have proved the additional allegations that the defendant personally inflicted great bodily injury on the victim, that the victim was a minor 14 years of age or older at the time of the offense, and that the defendant was 18 years old, or older, at the time of the offense. ¶ The People have the burden of proving these allegations beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved.

"Great bodily injury means significant or substantial injury. It is an injury that is greater than minor or moderate harm. ¶ Committing the crime of forcible rape is not by itself the infliction of great bodily injury. ¶ The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved."

According to defendant, the court's failure to instruct on the elements required to prove the applicability of section 667.61, subdivision (*l*) violates his Sixth Amendment right to have the jury find true every fact required to increase the length of his sentence. In support, defendant cites *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*).

In *Apprendi*, the United States Supreme Court held that the Sixth Amendment right to a jury trial requires any fact, other than a prior conviction, that increases the penalty for any crime beyond the prescribed statutory maximum be submitted to a jury and be proved beyond a reasonable doubt. (*Apprendi*, *supra*, 530 U.S. at p. 490.) In *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403], the Supreme Court explained that the statutory maximum is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. The question becomes whether the trial court had the authority to impose a particular sentence in question without finding any additional facts or only upon making an additional factual finding. If any additional finding of fact is required, *Apprendi* applies. (*Id.* at pp. 303, 305.)

Here, no additional finding of fact was required and *Apprendi* does not apply. Section 667.61, subdivision (*l*) provides: "Any person who is convicted of an offense specified in subdivision (n) under one or more of the circumstances specified in subdivision (d) or under two or more of the circumstances specified in subdivision (e), upon a victim who is a minor 14 years of age or older shall be punished by imprisonment in the state prison for life without possibility of parole."

The jury found defendant guilty of forcible rape, in violation of section 261, subdivision (a)(2) as stated in subdivisions (c)(1) and (n)(1) of section 667.61. The jury also found true the multiple victim allegation as stated in subdivision (e)(4) of section 667.61. The jury also found true the allegation set forth in section 667.61, subdivision (d)(6) that defendant personally inflicted great bodily injury on the victim in the commission of rape. H.R. was 15 years old at the time of the crime and defendant admitted the same. Defendant was over 18 years old at the time of the crime. The jury found all the facts required under section 667.61, subdivision (*l*) and the court did not err in failing to give defendant's proffered instruction.

Enhancement for Great Bodily Injury—Count 8

Defendant claims the trial court's imposition of the five-year great bodily injury enhancement as to both alternative sentences in count 8 violates section 667.61, subdivision (f). According to defendant, the sentences violate the prohibition against double use of a single fact to support both a sentence under section 667.61 and a separate enhancement.

Section 667.61, subdivision (f) states: "If only the minimum number of circumstances specified in subdivision (d) or (e) that are required for the punishment provided in subdivision (a), (b), (j), (*l*), or (m) to apply here been pled and proved, that circumstance or those circumstances shall be used as the basis for imposing the term provided in subdivision (a), (b), (j), (*l*), or (m) whichever is greater, rather than being used to impose the punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or the punishment under another provision of law can be imposed in addition to the punishment provided by this section. However, if any additional circumstance or circumstances specified in subdivision (d) or (e) have been pled and proved, the minimum number of circumstances shall be used as the basis for imposing the term provided in subdivision (a), (j), or (*l*) and any other

additional circumstance or circumstances shall be used to impose any punishment or enhancement authorized under any other provision of law."

Section 667.61, subdivision (f) does not apply to the present case. The statute references the circumstances specified in subdivision (d) or (e). Here, the five-year enhancement is from a separately pleaded and proved great bodily injury enhancement pursuant to section 12022.8. The jury also found true a separate aggravated sex crime great bodily injury pursuant to section 667.61, subdivisions (a) and (d)(6), which was used to sentence defendant to life in prison without the possibility of parole and the alternative sentence of 25 years to life.

Double Jeopardy—Counts 2, 4, 9, and 11

Defendant argues that under state and federal double jeopardy principles the convictions in counts 2, 4, 9, and 11 must be set aside as they are lesser included offenses within other counts of which defendant was convicted.

Applicable Law

Both the state and federal Constitutions prohibit successive prosecutions and multiple punishments for the same offense. Double jeopardy principles prohibit punishment for two offenses where one is a necessarily included offense of the other. For the purposes of double jeopardy, a necessarily included offense is where one offense cannot be committed without necessarily committing another offense. The latter offense is a necessarily included offense. Under the same elements test, when all the elements of the lesser offense are included in the elements of the greater offense it is a necessarily included offense. (*People v. Scott* (2000) 83 Cal.App.4th 784, 794 (*Scott*).) The elements test inquires into whether each offense contains an element not contained in the other; if not, they are the same offense and double jeopardy bars additional punishment. (*United States v. Dixon* (1993) 509 U.S. 688, 695-696 [125 L.Ed.2d 556] (*Dixon*).)

For certain purposes, the accusatory pleading test is employed to determine whether an offense is a lesser offense of another. A lesser offense is included within the

greater offense under the accusatory pleading test if the charging allegations of the accusatory pleading include language describing the offense as necessarily committed. (*People v. Lopez* (1998) 19 Cal.4th 282, 288-289.)

The appropriate test for double jeopardy is the elements test based on statutory comparison of the crimes. This is because the accusatory pleading test has nothing to do with double jeopardy principles, which apply when " 'a given crime, by definition, *necessarily and at all times* is included within another one.' [Citation.] The accusatory pleading test, which unavoidably is fact specific, cannot be the benchmark that a crime in the abstract will necessarily and always be included within another one for purposes of double jeopardy." (*Scott, supra,* 83 Cal.App.4th at p. 796.)

Discussion

Defendant argues counts 2, 9, and 11, unlawful sexual intercourse, are lesser included offenses of counts 1, 8, and 10, forcible rape, and violate double jeopardy. Defendant concedes "[u]nlawful sexual intercourse is not a necessarily included offense of forcible rape because it requires proof the victim is a minor more than three years younger than the defendant. Because that element is not required to prove a violation of section 261, subdivision (a)(2), unlawful sexual intercourse is not necessarily included within forcible rape." However, defendant contends that under the accusatory pleading test, unlawful intercourse is a lesser included offense of forcible rape.

As noted, the double jeopardy bar applies only when the elements test, not the accusatory pleading test, is met. (*Dixon, supra,* 509 U.S. at p. 696; *Scott, supra,* 83 Cal.App.4th at p. 796.) Therefore, it does not matter whether counts 2, 9, and 11 were lesser included offenses under the accusatory pleading test. (*Scott, supra,* 83 Cal.App.4th at p. 796.)[2]

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[2] Defendant cites only dicta in *People v. Montoya* (2004) 33 Cal.4th 1031, 1035-1036 to support his argument to the contrary.

Defendant also asserts count 4, oral copulation of a person under 18 years, is a necessarily lesser included offense of count 3, forcible oral copulation of a minor over 14, under both the elements test and the accusatory pleading test and thus violates double jeopardy.

The court instructed on the elements of each offense. Count 4, oral copulation of a person under 18 years: "1. The defendant participated in an act of oral copulation with another person; [¶] AND [¶] 2. The other person was under the age of 18 when the act was committed." Count 3, forcible oral copulation of a minor over 14: "1. The defendant committed an act of oral copulation with someone else; [¶] 2. The other person did not consent to the act; [¶] 3. The other person was 14 to 17 years of age; [¶] AND [¶] 4. The defendant accomplished the act by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to someone."

Count 4 can be committed without necessarily committing count 3. Count 4 encompasses all minors under 18 years old, while forcible oral copulation of a minor over 14, count 3, only includes minors between 14 and 17 years old. Therefore, oral copulation of a person who is 13 years old can be committed without necessarily committing forcible oral copulation of a minor over 14.

Imposition of Consecutive Terms—Counts 5, 13, 14, 15, and 16

Defendant contends the consecutive terms on counts 5, 13, 14, 15, and 16 must run concurrently because the trial court did not orally impose consecutive terms on those counts.[3] Defendant concedes the abstract of judgment states they are to run consecutively.

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[3] Section 669, subdivision (a) provides, in part: "When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts . . . the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively." Section 669, subdivision (b)

However, at sentencing the trial court stated: "I regard the defendant as a serious threat to the community and deserving of the longest sentence legally permitted. As to Counts 1, 3, 5, 7, 8, 10, 13, 14, 15 and 16, I also find these offenses all punishable separately. They're certainly deserving of separate and consecutive punishment as allowed under Penal Code section 667.61(i) because each of these crimes involves a separate victim or the same victim on separate occasions." The court further stated it felt "strongly" that defendant should receive "the longest possible legally permissible sentence." In addition, the clerk's minutes also state the court explained its reasons for imposing consecutive sentences. The court properly specified that the counts in question were to run consecutively.

Imposition of Sentence—Counts 2, 4, 9, and 11

In imposing separate sentences on counts 2, 4, 9, and 11, the court calculated the sentence as one-third of the midterm, and then stayed each sentence pursuant to section 654. This calculation was incorrect. The one-third-the-midterm rule of section 1170.1, subdivision (a), only applies to a consecutive sentence, not a sentence stayed under section 654. (*People v. Cantrell* (2009) 175 Cal.App.4th 1161, 1164.) We are permitted to correct an unauthorized sentence and will do so in this instance. (*People v. Smith* (2001) 24 Cal.4th 849.)

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provides, in part: "Upon failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently."

DISPOSITION

The abstract of judgment is ordered corrected to reflect a sentence of 24 months, stayed under section 654, on counts 2, 4, 9 and 11. The trial court is directed to forward a certified copy of the corrected abstract to the Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.

RAYE, P. J.

We concur:

HULL, J.

MURRAY, J.